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No. 89-1063

In The

Supreme Court of the United States

October Term, 1989

FIRSTIER MORTGAGE CO., a/k/a
REALBANC, INC.,

Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the January 26, 1989 oral announcement was a final decision in light of the fact that the Court requested Respondent to submit suggested findings of fact and conclusions of law, that the Court then allowed Petitioner a specified period of time to respond to the suggested findings and conclusions, and that the Court then indicated it would modify, add to, or delete and enter its own findings of fact and conclusions of law and judgment?

2. If the January 26, 1989 oral announcement was not a final decision, whether Petitioner's premature notice of appeal may be considered as if taken from the trial court's subsequently announced final order?

TABLE OF CONTENTS

Page

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

LEGAL ARGUMENTS AND AUTHORITIES 8

PROPOSITION I

THE JANUARY 26, 1989 ORAL ANNOUNCEMENT WAS NOT A FINAL APPEALABLE ORDER BECAUSE THE TRIAL COURT INTENDED TO AND DID FOLLOW THE ORAL ANNOUNCEMENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT 8

PROPOSITION II

FIRSTIER'S NOTICE OF APPEAL, FILED BEFORE ANNOUNCEMENT OF A FINAL DECISION, IS PREMATURE AND INEFFECTIVE TO INVOKE APPELLATE JURISDICTION 13

A. THE REQUIREMENT FOR A TIMELY NOTICE OF APPEAL IS MANDATORY AND JURISDICTIONAL 13

B. RULE 4(a)(2) OF THE RULES OF APPELLATE PROCEDURE IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION 15

1. Rule 4(a)(2) applies only when a notice of appeal is filed after announcement of a final decision 15

2. Rule 4(a)(2) is intended to validate appeals filed after announcement of a final decision but before the decision is entered 17

TABLE OF CONTENTS – Continued

Page

3. Rule 4(a)(2) should not be construed to validate appeals from interlocutory orders or nonfinal announcements because such a construction would result in both the reviewing court and the trial court simultaneously reviewing the same announcement. 19

4. Courts hold that Rule 4(a)(2) is not applicable to appeals taken from interlocutory orders 22

C. CASE LAW APPLYING RULE 4(a)(2) TO PREMATURE APPEALS FILED AFTER A FINAL DECISION ON SOME BUT NOT ALL CLAIMS IS INAPPOSITE TO THIS CASE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION 23

PROPOSITION III

BANKERS TRUST CO. V. MALLIS IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986) 20

Alcom Electronic Exchange, Inc. v. Burgess, 849 F.2d 964 (5th Cir. 1988) 26, 27

Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) ..... *passim*

Campbell Industries v. Logistics Int'l, Inc., 816 F.2d 1401 (9th Cir. 1987) 12

Carnes v. United States, 279 F.2d 378 (10th Cir. 1960), *cert. denied* 364 U.S. 846 (1960) 11, 12

Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945) 8, 9

Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979) 8, 13, 26

Diamond v. McKenzie, 770 F.2d 225 (D.C. Cir. 1985) 24

Dowling v. City of Philadelphia, 855 F.2d 136 (3rd Cir. 1988) 24

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) 14

Freeman v. Hittle, 747 F.2d 1299 (9th Cir. 1985) 24

TABLE OF AUTHORITIES – Continued

Page(s)

General Television Arts, Inc. v. Southern Railway Co., 725 F.2d 1327 (11th Cir. 1984) 22, 23

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1978) 14, 19, 20, 21

Jones v. Celotex Corp., 857 F.2d 273 (5th Cir. 1988) ... 24, 28

Knight v. Brown Transport Corp., 806 F.2d 479 (3rd Cir. 1986) 24

Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988) 25

Maryland Casualty Co. v. Conner, 382 F.2d 13 (10th Cir. 1967) 14

Osterneck v. E. T. Barwick Ind., Inc., 825 F.2d 1521 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 819 (1987) 22, 26

Rivers v. Washington County Bd. of Educ., 770 F.2d 1010 (11th Cir., 1985) 24

Robinson v. Tanner 798 F.2d 1378 (11th Cir. 1986), *cert. denied* 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987) 22, 23, 25, 26, 27

Sacks v. Rothberg, 845 F.2d 1098 (D.C. Cir. 1988) 24

Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) 14

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958) .. 8, 9, 11

United States v. Green, 847 F.2d 622 (10th Cir. 1988) 26

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. Hansen, 795 F.2d 35 (7th Cir. 1986) 19, 22, 23, 25

United States v. Taylor, 632 F.2d 530 (5th Cir. 1980) 26

STATUTES

28 U.S.C. §1291 ..... *passim*

28 U.S.C. §2107 ..... 1, 7, 13, 14, 28

OTHER

Fed. R. App. P. 1(b) 1, 18

Fed. R. App. P. 4(a)(1) 1, 13, 14

Fed. R. App. P. 4(a)(2) ..... *passim*

Fed. R. App. P. 4(a)(4) 2, 20, 21

Fed. R. Civ. P. 52(b) 20

Fed. R. Civ. P. 54(a) 17

Fed. R. Civ. P. 54(b) 22, 24, 25

Fed. R. Civ. P. 58 ..... 5, 12, 17, 18, 24, 28

Fed. R. Civ. P. 79(a) 5, 17, 18, 24

Fed. R. Crim. P. 11(a)(2) 26

Notes of Advisory Committee on Rules, following 28 U.S.C.A. Fed. R. Civ. P. 58, at page 642 27

9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice* ¶204.14 at 4-128 – 4-129 (2d ed. 1990) 16

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

1. 28 U.S.C. §1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. 28 U.S.C. §2107 provides, in relevant part:

Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

3. Fed. R. App. P. 1(b) provides:

Rules Not to Affect Jurisdiction

These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

4. Fed. R. App. P. 4(a)(1) provides:

In a civil case in which an appeal is permitted by law as of right from a district court to a court

of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

5. Fed. R. App. P. 4(a)(2) provides:

Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

6. Fed. R. App. P. 4(a)(4) provides:

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

STATEMENT OF THE CASE

The Petitioner, FirsTier Mortgage Co. ("FirsTier") commenced this litigation when it brought suit to recover on eight policies of private mortgage insurance which were underwritten by the Respondent, Investors Mortgage Insurance Co. ("IMI")[1]. FirsTier alleged two causes of action. One sounded in contract and one purportedly sounded in tort for breach of the alleged duty of good faith and fair dealing. J.A. 4-7.[2] The trial court's jurisdiction was grounded on 28 U.S.C. §1332. IMI moved for summary judgment on the grounds that the policies were void and unenforceable because of fraud and/or material misrepresentations made by or in behalf of FirsTier in the insurance applications. R. Doc. 106.[3]

On January 26, 1989 the trial court heard oral argument on IMI's Motion For Summary Judgment. After hearing oral argument, the trial court stated that "the policies should be and are cancelled as void for want [sic] of fraud, bad faith." J.A. 27. The trial court requested that IMI submit suggested findings of fact and conclusions of law. *Id*. The trial court specifically advised the parties that

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[1] IMI's parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates are: Investors Mortgage Insurance Holding Company; Investors Equity Insurance Company, Inc.; Financial Products and Services, Inc. (formerly Investors Conduit Corp.); and Investors Mortgage Financial Services, Inc.

[2] References to the Joint Appendix will be designated "J.A." followed by the page number in the Joint Appendix.

[3] References to the record below will be designated "R. Doc." followed by the document number reflected on the docket sheet.

after giving FirsTier an opportunity to show the Court where IMI's suggested findings and conclusions were in error, the trial court would write its own findings of fact and conclusions of law *and judgment*. *Id.* The trial court said:

> The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.
>
> . . .
>
> And if Mr. Dawson cares to do so, within five days you may file with the Court your objections or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

Id.

On February 8, 1989, FirsTier filed a Notice of Appeal from the January 26, 1989 oral announcement. Subsequently, on February 13, 1989, FirsTier filed what it called its "Objection to Defendant's Suggested Findings of Fact and Conclusions of Law." App. to Opp. to Cert. A-1.[4] FirsTier's "Objection" controverts virtually every suggested finding and conclusion submitted by IMI. In fact, FirsTier's "Objection" concludes with the assertion that "IMI is not entitled to summary judgment." *Id.* at 19.

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[4] References to items in the Appendix to the Brief in Opposition to the Petition for Writ of Certiorari will be designated "App. to Opp. to Cert." followed by the applicable page number.

On February, 13, 1989, FirsTier also filed a document which it called "FirsTier's Suggested Findings of Fact and Conclusions of Law." App. to Opp. to Cert. B-1. FirsTier's "Suggested Findings" reassert virtually every factual and legal argument FirsTier had made in opposition to IMI's Motion for Summary Judgment. As with the February 13, 1989 "Objection", FirsTier's "Suggested Findings" argue for findings and conclusions which are directly contrary to those submitted by IMI. FirsTier's "Suggested Findings" conclude by arguing that "IMI is not entitled to summary judgment." *Id.* at B-17.

Subsequently, on March 3, 1989, the trial court announced a final decision in favor of IMI. The trial court's final decision was embodied in a formal "Memorandum Opinion" (App. to Pet. for Cert. E-1) and a separate "Order and Judgment" pursuant to Rule 58 of the Federal Rules of Civil Procedure (*Id.* at D-1). The Court's Memorandum Opinion is reported at 708 F. Supp. 1224 (W.D. Okl. 1989). Also, on March 3, 1989, the "Order and Judgment" of the trial court was entered on the clerk's docket pursuant to Rule 79(a) of the Federal Rules of Civil Procedure. App. to Pet. for Cert. F-14, Doc. 159.

FirsTier also filed a notice of appeal from the March 3, 1989 final decision. J.A. 58. However, FirsTier did not file that appeal within 30 days after entry of the final judgment rendered on March 3, 1989. Instead, FirsTier sought and obtained leave of court to file the appeal out of time. J.A. 55 & 57. IMI timely appealed from the trial court's order allowing FirsTier to file the appeal out of time. R. Doc. 182. FirsTier's appeal from the March 3, 1989 final judgment and IMI's appeal from the trial court's order allowing FirsTier to appeal out of time are

docketed as Case Nos. 89-6145 and 89-6150, respectively, in the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit heard oral argument on both cases on May 1, 1990.

On September 26, 1989, the United States Court of Appeals for the Tenth Circuit entered an Order dismissing FirsTier's appeal from the January 26, 1989 oral announcement for want of jurisdiction. The Tenth Circuit held as follows:

> 89-6042 is dismissed for lack of jurisdiction. The oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291.

See App. to Pet. for Cert. A-2.

The Supreme Court granted certiorari to review the propriety of the Tenth Circuit's dismissal of the appeal from the oral announcement. As noted above, FirsTier's subsequent appeal from the March 3, 1989 final order is still pending before the Tenth Circuit.

SUMMARY OF ARGUMENT

A final judgment is one that ends the litigation and leaves nothing for the court to do but execute on the judgment. The oral announcement by the trial court at the January 26, 1989 hearing on IMI's Motion for Summary Judgment was not a final judgment. The trial court did not evidence its intent that the oral announcement would be its final act. Instead, the trial court requested that IMI submit findings of fact and conclusions of law, informed FirsTier that it would have an opportunity to object to

IMI's suggested findings and conclusions, and informed the parties that after reviewing the suggestions it would modify, add to, or delete from them and write its own findings and conclusions and judgment.

28 U.S.C. §1291 vests the Courts of Appeals with appellate jurisdiction to review *final* judgments of the District Courts. Further, pursuant to 28 U.S.C. §2107, the Courts of Appeals can review a final judgment only when appellate jurisdiction is invoked by the timely filing of a notice of appeal. Since the oral announcement was not a final judgment, Section 1291 does not confer jurisdiction on the Court of Appeals to review it. Consequently, FirsTier's Notice of Appeal *from the January 26, 1989 oral announcement* is an ineffective attempt to appeal a nonfinal oral announcement.

Rule 4(a)(2) of the Fed. R. App. P. does not validate FirsTier's premature appeal. By its terms, Rule 4(a)(2) merely treats a Notice of Appeal filed after announcement of a decision but before its entry on the civil docket as being filed after the decision is entered. Rule 4(a)(2) does not expand the appellate jurisdiction conferred by 28 U.S.C. §1291. It does not allow a party to appeal a nonfinal decision and it does not abrogate the jurisdictional requirement that a timely notice of appeal be filed in order to invoke appellate jurisdiction.

Final judgment was not entered in this case until March 3, 1989. If FirsTier wished to appeal the March 3, 1989 final judgment, FirsTier was required to file a notice of appeal within 30 days thereafter. The notice of appeal filed in this case purports to appeal from the January 26, 1989 oral announcement and not from the March 3, 1989

final judgment. Further, the notice of appeal was filed before the final judgment was either announced or entered. Consequently, FirsTier's Notice of Appeal does not satisfy the jurisdictional requirements for effecting an appeal and is therefore ineffective to invoke appellate jurisdiction. Accordingly, the United States Court of Appeals for the Tenth Circuit properly dismissed the appeal.

LEGAL ARGUMENTS AND AUTHORITIES

PROPOSITION I

THE JANUARY 26, 1989 ORAL ANNOUNCEMENT WAS NOT A FINAL APPEALABLE ORDER BECAUSE THE TRIAL COURT INTENDED TO AND DID FOLLOW THE ORAL ANNOUNCEMENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

Under 28 U.S.C. §1291, the Courts of Appeals have appellate jurisdiction only over "final decisions" of the district courts. In pertinent part, §1291 provides:

> The courts of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. (Emphasis added).

The Supreme Court has long held that a final decision under §1291 is one which "ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). *Accord, United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232, 78 S.Ct. 674, 678, 2 L.Ed.2d 721 (1958); *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 565 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979). The purpose of the finality requirement is to prevent piecemeal litigation by precluding appellate review until the trial court finally disposes of the entire case – " '[t]he case is not to be sent up in fragments.' " *Catlin*, 324 U.S. at 233, 65 S.Ct. at 634 (citation omitted). Consequently, a judgment is final only when it "evidences the judge's intention that it shall be his final act in the case." *F. & M. Schaefer Brewing Co.*, 356 U.S. at 232, 78 S.Ct. at 678. *See also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387-388, 98 S.Ct. 1117, 1127, 55 L.Ed.2d 357 (1978) (district court intended that decision be final).

Measured by this standard, the trial court's oral announcement at the January 26, 1989 hearing was not a final decision. The oral announcement did not, as articulated by the Supreme Court, "leave nothing for the court to do but execute on the judgment" and did not "evidence the judge's intention that it shall be his final act in the case." On the contrary, the trial court requested that IMI prepare suggested findings of fact and conclusions of law and allowed FirsTier a specified period of time to respond thereto. The trial court expressly informed the parties that after reviewing the suggested findings and conclusions, the court would "modify, add to or delete" from them as the court deemed appropriate and would then "write its own findings of fact and conclusions of law and judgment." Thus, the court clearly indicated its intent to retain jurisdiction over the case until it rendered a final decision. And, approximately five weeks later, the trial court rendered its Memorandum Opinion and a final Order and Judgment.[5]

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[5] The docket entry on January 26, 1989 merely recites that the hearing occurred, that the trial court heard oral argument,

(Continued on following page)

Further, the oral announcement was treated as interlocutory by the parties.[6] Both parties submitted suggested findings of fact and conclusions of law. FirsTier even urged the Court to reverse its preliminary decision and find that IMI was *not* entitled to summary judgment. Thus, FirsTier's assertion that as a practical matter the oral announcement was a final decision is flatly contradicted by the record. Indeed, FirsTier's "Objection" and "Suggested Findings", which challenged whether IMI

(Continued from previous page)

that the trial court indicated that the policies should be cancelled, that the parties should submit suggested findings of fact and conclusions of law, and that the trial court would modify, add to, or delete from the suggested findings and conclusions and enter its own. Pet. for Cert. F-13, Doc. 148. The trial court did not render a final judgment and judgment was not entered in the civil docket until March 3, 1989 when the court rendered its "Memorandum Opinion" and a separate "Order and Judgment." *Id.* at F-14, Docs. 158 and 159.

[6] FirsTier contends IMI treated the oral announcement as a final decision because shortly after the January 26, 1989 hearing, counsel commenced research regarding a prevailing party's right to recover attorney fees, filed a fee application, and inquired about procedures for publishing court decisions. However, unlike the requirements for perfecting an appeal, nothing in the local court rules regarding fee applications is jurisdictional and nothing in the local court rules prevents a party from filing a fee application *before* announcement of a final decision. Further, IMI filed a supplementary fee application *after* final judgment was entered, thereby assuring that a timely fee application had been filed. J.A. 36. Finally, FirsTier's reliance on statements made in the Supplementary Application that IMI had won a "complete and total victory" is misplaced. As noted, the Supplementary Application was filed *after* final judgment was announced and entered.

was entitled to summary judgment, implicitly acknowledge that until the trial court rendered a final decision, the preliminary decision orally announced at the hearing was nothing more than a statement of intention which was subject to change.

The Supreme Court has recognized that when a judge indicates his intention to render a formal judgment, it is the formal judgment and not statements in an opinion or docket entry that constitute the final judgment:

> Where, as here, a final judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or docket entry. * * * The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 235, 78 S.Ct. 674, 679, 2 L.Ed.2d 721 (1958).

Similarly, in *Carnes v. United States*, 279 F.2d 378, 379-80 (10th Cir. 1960), *cert. denied*, 364 U.S. 846 (1960), the Tenth Circuit held that an oral announcement cannot constitute a final decision when the trial court indicates that it intends to follow the oral announcement with a formal judgment:

> For the purpose of an appeal, a final judgment is the court's act or pronouncement which disposes of the matter under consideration. . . . When the Judge acts in a manner which clearly indicates his decision that the act shall be the final one in the case and a notation of the act has been entered on the docket, the time to appeal begins to run under Rule 73(a). But if it is not clearly indicated that the Judge's act was intended to be his final act in the case, and if it appeared that a formal judgment is contemplated, then the time for appeal does not begin to run.

Id. at 379-380 (citations omitted). The *Carnes* Court concluded:

> From the record as a whole, including the showing that a formal order was signed at a later date, we conclude that the judge did not intend his declaration from the bench to be his final act, but did intend that a formal order denying the motion would be prepared and signed by him.

Id. at 380 (footnote omitted). *Accord Campbell Industries v. Logistics Int'l, Inc.*, 816 F.2d 1401, 1404 (9th Cir. 1987).

The trial court in the instant case did not intend that the oral announcement would be its final act. The trial court clearly evidenced its intention to retain jurisdiction and to write findings of fact and conclusions of law and judgment. Final judgment was not announced or entered until March 3, 1989, when the court filed its "Memorandum Opinion" and a separate "Order and Judgment" and the same was entered on the clerk's docket. Fed. R. Civ. P. 58. Consequently, the oral announcement was not a final appealable decision and the Notice of Appeal, *filed before a final judgment was announced or entered,* was premature

and ineffective to vest the Court of Appeals with appellate jurisdiction:

> Where the trial court has power to further review its judgment it cannot be said that the judgment is final as long as it is being considered by the court . . . An attempt to appeal a non-final decision of a district court remains just that, an attempt. It is a nullity and does not divest the trial court of its jurisdiction.

Century Laminating, Ltd. v. Montgomery, 585 F.2d 563, 567 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979).

The *Century Laminating* Court concluded by noting that when a premature appeal is filed interests of justice *do not* require that the Court give effect to the appeal; instead, the Court held that the "virtue in finality" mandates dismissal "especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself". *Id.* at 568. Because the January 26, 1989 oral announcement was not intended as the court's final act, the oral announcement was not a final decision, the appeal was premature, and the Court of Appeals properly dismissed the case for want of jurisdiction.

PROPOSITION II

FIRSTIER'S NOTICE OF APPEAL, FILED BEFORE ANNOUNCEMENT OF A FINAL DECISION, IS PREMATURE AND INEFFECTIVE TO INVOKE APPELLATE JURISDICTION.

A. THE REQUIREMENT FOR A TIMELY NOTICE OF APPEAL IS MANDATORY AND JURISDICTIONAL.

Pursuant to 28 U.S.C. §2107 and Fed. R. App. P. 4(a)(1), a notice of appeal in a civil case must be filed

within thirty days *after* entry of the judgment or order from which appeal is taken. This time limit is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1978); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Maryland Casualty Co. v. Conner*, 382 F.2d 13, 15 (10th Cir. 1967).

FirsTier's reliance on *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), for the proposition that the absence of prejudice somehow affects the jurisdictional requirements imposed by the Federal Rules is misplaced. The *Torres* Court specifically noted that *Foman* did not involve a jurisdictional issue because the appellant in *Foman* had complied with the applicable rules. *Torres*, 108 S.Ct. at 2408. The *Torres* Court concluded that although a court may liberally construe the rules, "it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres*, 108 S.Ct. at 2409. The *Torres* Court reasoned that to the extent the jurisdictional requirements imposed by the Federal Rules of Appellate Procedure lead to harsh results, " 'the harshness of our construction is imposed by the legislature and not by the judicial process.' " *Torres*, 108 S.Ct. at 2409.

Final judgment was announced and entered on March 3, 1989. Thus, pursuant to 28 U.S.C. §2107 and Rule 4(a)(1), if FirsTier wished to appeal it was required to file a Notice of Appeal within 30 days thereafter. However, FirsTier did not file an appeal from the March 3, 1989 Order within the 30 day mandatory time period. In fact, *the Notice of Appeal at issue in this case was not taken from the March 3, 1989 final judgment*. Instead, FirsTier

appealed from the interlocutory oral announcement and noticed that appeal on February 8, 1989, more than three weeks *before* final judgment was announced. J.A. 54.[7] Thus, the appeal is untimely and was properly dismissed by the court of appeals.

B. RULE 4(a)(2) OF THE RULES OF APPELLATE PROCEDURE IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION.

1. Rule 4(a)(2) applies only when a notice of appeal is filed after announcement of a final decision.

FirsTier contends that under Fed. R. App. P. 4(a)(2) the premature Notice of Appeal *from the January 26, 1989 oral announcement* operates as an appeal from the *subsequent* final judgment. However, because the trial court did not announce a final decision at the January 26, 1989 hearing, Rule 4(a)(2) is not applicable and does not validate the appeal. Rule 4(a)(2) of the Rules of Appellate Procedure provides:

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[7] FirsTier later filed a Notice of Appeal from the March 3, 1989 final judgment. J.A. 58. The latter appeal is an appeal on the merits. However, it was filed out of time. FirsTier sought and obtained leave for filing the appeal out of time. J.A. 55 & 57. IMI timely appealed from the trial court's order allowing FirsTier to file the appeal out of time. R. Doc. 182. FirsTier's appeal from the March 3, 1989 final judgment and IMI's appeal from the trial court's order allowing FirsTier to appeal out of time are pending before the United States Court of Appeals for the Tenth Circuit. Both appeals have been fully briefed. The Tenth Circuit heard oral argument on both cases on May 1, 1990.

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

By its express terms, Rule 4(a)(2) validates a premature notice of appeal only when the notice is filed after a decision or order but before the entry of judgment. In light of Rule 1(b) which explicitly provides that the Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law," Rule 4(a)(2) can be read *only* to validate premature appeals taken from "final decisions" as that term is used in 28 U.S.C. §1291. Indeed, it is only from such final decisions that §1291 confers appellate jurisdiction on the courts of appeals. Consequently, Rule 4(a)(2) cannot operate to render the February 8, 1989 Notice of Appeal effective. The January 26, 1989 oral announcement was not a final decision and it was not the same decision ultimately entered on March 3, 1989. According to Professor Moore:

> [Rule 4(a)(2)] applies, therefore, only to a decision that will be final on its entry. It does not make appealable an order that is not appealable under §1291 or §1292(a). It remains true, therefore, that an appeal from an interlocutory order not appealable under §1292(a) will be dismissed and an appeal will have to be taken from the final decision. Nor does it save an appeal that is taken from an order appealable only on a finding under Rule 54(b).

9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice* ¶204.14 at 4-128 -- 4-129 (2d ed. 1990).

2. Rule 4(a)(2) is intended to validate appeals filed after announcement of a final decision but before the decision is entered.

The circumstances surrounding the adoption of the 1979 amendments to the Federal Rules of Appellate Procedure, which include the amendment to Rule 4(a)(2) at issue in this case, confirm Professor Moore's analysis. The Supreme Court had recently decided *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978). *Bankers Trust* addressed the provision in Fed. R. Civ. P. 58 that a judgment[8] is effective only when set forth on a separate document and entered as provided in Rule 79(a). In the *Bankers Trust* case, judgment had been entered on the civil docket pursuant to Rule 79(a) but the judgment was never set forth on a separate document as required by Rule 58. Nevertheless, the Supreme Court ruled that the Court of Appeals had jurisdiction over the case. The Court reasoned that the parties waived the separate document requirement since judgment had been entered on the judgment docket, the trial court had evidenced its intent that the judgment was its final act, and the appellee did not object to the appellant taking the appeal. *Bankers Trust*, 435 U.S. at 387-388, 98 S.Ct. at 1127.

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[8] The Supreme Court noted that "[a] 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. §1291." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, n.4, 98 S.Ct. 1117, 1119, 55 L.Ed.2d 357 (1978). The Supreme Court noted that Federal Rule of Civ. Proc. 54(a) provides that " '[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." *Id.*

However, the *Bankers Trust* Court distinguished the separate document requirement from Rule 58's requirement that a judgment be entered pursuant to Rule 79(a), recognizing that "the keeping of a civil docket under Rule 79 fulfills a public record keeping function over and above the giving of notice to the losing party that a final decision has been entered against it." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, n.4, 98 S.Ct. 1117, 1119, 55 L.Ed.2d 357 (1978). Accordingly, the *Bankers Trust* Court assumed, without deciding, that unlike the separate document requirement, the *entry* of judgment required by Rule 58 is a jurisdictional prerequisite to appellate review. *Bankers Trust*, 435 U.S. at 384, 98 S.Ct. at 1119. Consequently, after *Bankers Trust*, a notice of appeal filed after announcement of a final decision but before the decision was entered as required by Rules 58 and 79(a) might not have been effective to invoke appellate jurisdiction.

Rule 4(a)(2) filled the gap created by *Bankers Trust*. The rule was intended to assure that a notice of appeal filed after announcement of a final decision but before entry of judgment would not result in loss of the appeal. The rule was not intended to allow a party to commence an appeal before a final decision had been announced. To hold otherwise would contravene Fed. R. App. P. 1(b) by impermissibly expanding 28 U.S.C. §1291 to allow the courts of appeals to review interlocutory orders.

In fact, such a result is precluded by the plain language of the rule. By its terms, Rule 4(a)(2) merely operates to treat a notice of appeal filed after announcement of an order but before its entry as being filed after entry. Rule 4(a)(2) does not purport to amend the notice of appeal to change the order sought to be reviewed. Thus,

if Rule 4(a)(2) was applicable to interlocutory orders, it would operate only to treat a premature notice of appeal as being filed after entry of the *interlocutory* order. The order appealed from would still be interlocutory in nature and the court of appeals would not have jurisdiction. 28 U.S.C. §1291. One court articulated the jurisdictional defects created by such an interpretation as follows:

> Hence the issue is whether the defendants can appeal from a subsequent final judgment, without having a notice of appeal from that judgment, merely because they filed an earlier notice of appeal from a nonfinal, nonappealable order. We think not.

United States v. Hansen, 795 F.2d 35, 38 (7th Cir. 1986). The *Hansen* Court noted that the appellant, "anticipating defeat, might as well have filed the notice of appeal simultaneously with the filing of their counterclaims." *Id.*

3. Rule 4(a)(2) should not be construed to validate appeals from interlocutory orders or nonfinal announcements because such a construction would result in both the reviewing court and the trial court simultaneously reviewing the same announcement.

It has long been "understood that a federal district court and a federal court of appeals should not exercise jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 54, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). Consequently, the filing of a notice of appeal is an event of jurisdictional significance that divests the district court of jurisdiction. *Id.* However, Rule 4(a)(4) gives the district court express authority to entertain certain motions, including motions under Fed.

R. Civ. P. 52(b) to amend or make additional findings of fact and motions under Rule 59 to alter or amend the judgment, even *after* a notice of appeal is filed. *See* Fed. R. App. P. 4(a)(4); *Griggs*, 459 U.S. at 59, 103 S.Ct. at 402. In order to assure that the district court and the court of appeals do not exercise jurisdiction over the same matter, however, the 1979 amendments expressly provide that a notice of appeal filed before entry of the order on one of the motions enumerated in Rule 4(a)(4) is ineffective and a new notice of appeal must be filed. *See* Rule 4(a)(4).

Pursuant to Rule 4(a)(4), the Supreme court has made clear that a notice of appeal filed before entry of judgment on one of the motions listed in Rule 4(a)(4) is a nullity. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), the Supreme Court articulated this rule as follows:

> The notice of appeal filed in this case on November 19, 1980, was not merely defective; it was a nullity. Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'

Griggs, 103 S.Ct. at 403 (citations and footnotes omitted). *Accord, Acosta v. Louisiana Department of Health and Human Resources*, 478 U.S. 251, 106 S.Ct. 2876, 2878, 92 L.Ed.2d 192 (1986).

The *Griggs* Court recognized that a premature notice of appeal must be considered a nullity because otherwise

both the court of appeals and the district court would be simultaneously analyzing the same judgment. According to the *Griggs* Court, Rule 4(a)(4) was intended to avoid that potential conflict by depriving the courts of appeals of jurisdiction in such situations. *Griggs*, 459 U.S. at 61, 103 S.Ct. at 403.

FirstTier filed two pleadings on February 13, 1989 which it called "Objection to Defendant's Suggested Findings of Fact and Conclusions of Law" and "FirstTier's Suggested Findings of Fact and Conclusions of Law", respectively. Both pleadings assail the decision announced by the trial court at the January 26, 1989 hearing and argue for findings and conclusions that support a decision in favor of FirsTier on IMI's Motion for Summary Judgment. Both pleadings specifically urge the trial court to find that "IMI is not entitled to summary judgment." App. to Opp. to Cert. A-19 and B-17.

FirsTier's "Suggested Findings" and "Objections" implicate the policy reasons underlying Rule 4(a)(4) regardless of whether they constitute tolling motions. In light of the fact that FirsTier filed the document before final judgment had been announced or entered, it is apparent that FirsTier intended for the trial court to consider the "Objections" and "Suggested Findings" when rendering a final decision in this case. However, if Rule 4(a)(2) is interpreted to validate the premature notice of appeal, then contrary to the policy underlying the 1979 amendments to Rule 4, the court of appeals and the trial court would be analyzing the same oral announcement at the same time. Thus, Rule 4(a)(2) cannot be interpreted to validate FirsTier's appeal from the oral announcement.

4. Courts hold that Rule 4(a)(2) is not applicable to appeals taken from interlocutory orders.

The overwhelming majority of courts construing Rule 4(a)(2) in the context of interlocutory orders and nonfinal announcements agree with Professor Moore and hold that the rule is not applicable. *General Television Arts, Inc. v. Southern Railway Co.*, 725 F.2d 1327, 1330-1331 (11th Cir. 1984); *Osterneck v. E. T. Barwick Ind., Inc.*, 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 819 (1987); *United States v. Hansen*, 795 F.2d 35, 38 (7th Cir. 1986); *Robinson v. Tanner*, 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).

In *General Television, supra*, the appellant filed the notice of appeal after the trial court had entered a *partial* summary judgment but before the entry of a final decision. The premature appeal could not be saved by a Rule 54(b) certification because the partial summary judgment went only to the issue of liability. Therefore, the appellant argued that the Court should give Rule 4(a)(2) a liberal reading and allow the appeal. The Court refused, holding that Rule 4(a)(2) validated only those premature notices of appeal that are filed after announcement of a *final* judgment but before the final judgment is formally entered:

> The purpose of that rule is to avoid the harsh result that may obtain when a district court has announced its final judgment and zealous counsel in his haste to file a notice of appeal does so before the district court formally enters the order containing its judgment. The rule was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. Hence this Court and its predecessor continue to hold after the enactment of Rule 4(a)(2) in 1979 that a final judgment does not "retroactively validate the premature notice of appeal." . . . Consequently, Rule 4(a)(2) does not confer jurisdiction upon a Court of Appeals unless the appellant has filed a notice of appeal *after* the announcement of judgment but before the entry of the order.
>
> There was no announcement of the final judgment prior to GTA's filing of the notice of appeal. . . . Consequently, the district court's certification for interlocutory appeal of its partial summary judgment on liability cannot be considered an announcement of final judgment. Because this Court is without jurisdiction, the APPEAL IS DISMISSED.

General Television, 725 F.2d at 1330-31 (citations and footnotes omitted). *Accord, Hansen*, 795 F.2d at 38; *Robinson*, 798 F.2d at 1382-83.

General Television and the authorities cited above comport with the plain meaning of Rule 4(a)(2) and establish that the February 8, 1989 Notice of Appeal is ineffective because it purports to take an appeal from an interlocutory oral announcement, not a *final* decision. Accordingly, the Court of Appeals properly dismissed the appeal.

C. CASE LAW APPLYING RULE 4(a)(2) TO PREMATURE APPEALS FILED AFTER A FINAL DECISION ON SOME BUT NOT ALL CLAIMS IS INAPPOSITE TO THIS CASE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION.

FirsTier cites a line of cases from various circuits for the proposition that the Court of Appeals' decision in this

case is in conflict with decisions from the other circuits. FirsTier's Brief at 29-31. The cases cited by FirsTier are inapposite because they concern situations where the trial courts had rendered judgments disposing of some but not all of the claims at issue. The parties against whom judgment had been rendered filed appeals before judgment was entered on the remaining claims and without first obtaining Rule 54(b) certifications. The various Courts held that the appeals ripened when the remaining claims were finally disposed of. *See Sacks v. Rothberg*, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (judgment on complaint did not dispose of counterclaims); *Dowling v. City of Philadelphia*, 855 F.2d 136, 138 (3d Cir. 1988) (same); *Rivers v. Washington County Bd. of Educ.*, 770 F.2d 1010, 1011 (11th Cir. 1985) (judgment disposed of claims of one plaintiff but not the other); *Knight v. Brown Transport Corp.*, 806 F.2d 479, 483-484 (3rd Cir. 1986) (same); *Freeman v. Hittle*, 747 F.2d 1299, 1301 (9th Cir. 1985) (summary judgment for one defendant but not the others).[9]

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[9] FirsTier also cites *Diamond v. McKenzie*, 770 F.2d 225 (D.C. Cir. 1985). However, the only issue before the *Diamond* Court was whether the separate document required by Fed. R. Civ. P. 58 was a jurisdictional prerequisite to appellate review. The order appealed from was final in all other respects and judgment had been entered as required by Rules 58 and 79. Relying on *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978), the Court held that a separate document was not necessary to appellate jurisdiction. Rule 4(a)(2) was not at issue in the *Diamond* case. Further, the *Diamond* case is inapposite because the oral announcement in this case was not a final decision and judgment was not entered before the appeal was filed. *See Jones v. Celotex Corp.*, 857 F.2d 273, 275 (5th Cir. 1988), *cert. denied* 110 S.Ct. 260 (the separate document rule cannot be waived if there has been no final decision.).

The cases cited by FirsTier do not conflict with the Court of Appeals' decision in this case. Rather, they are consistent with the general rule recognized in many circuits, *including the Tenth Circuit*, that in cases involving multiple claims and multiple parties, a notice of appeal filed after entry of an interlocutory order disposing of some but not all of the claims or parties may nevertheless be rendered effective if the interlocutory order is later rendered final by disposing of the remaining claims or by subsequently entering a Rule 54(b) certification. *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 643-644 (10th Cir. 1988). In fact, this is the precise context in which the Tenth Circuit recently held that Fed. R. Civ. P. 4(a)(2) permits the interpretation that a subsequent Rule 54(b) certification ripens a premature notice and saves the appeal. *Id.* at 645. *See also Robinson v. Tanner*, 798 F.2d 1378, 1382-1385 (11th Cir. 1986) (analyzing various decisions, including decisions cited by FirsTier, and holding that an appeal from an order which is not final as to any claim or party must be dismissed as premature).

Critically, in a Rule 54(b) situation, the otherwise "premature" appeal satisfies the jurisdictional requirements imposed by 28 U.S.C. §1291 because a Rule 54(b) certification can be granted only where the decision appealed from finally disposes of an entire claim or party. *United States v. Hansen*, 795 F.2d 35, 38 (7th Cir. 1986). As articulated by the *Hansen* Court:

> The notice of appeal in such a case is timely; all that is missing is a finding necessary to make the order appealed from appealable.

Hansen, 795 F.2d at 38.

Obviously, this rationale is inapplicable where, as here, the decision appealed from is not final because the trial court has retained power to amend the judgment and has indicated its intent to prepare a formal judgment and separate findings and conclusions as to all claims. *See Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989); *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 566 (10th Cir. 1979), *cert. dismissed*, 444 U.S. 987 (1979); *Robinson v. Tanner*, 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).[10] Thus FirsTier's cases are inapposite and do not conflict with the Court of Appeals' decision in this case.[11]

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[10] FirsTier's reliance on *United States v. Green*, 847 F.2d 622 (10th Cir. 1988), is misplaced. *Green* involved an appeal from a *criminal* conviction. Further, the appeal was taken only after Green entered a conditional plea of guilty under Fed. R. Crim. P. 11(a)(2), which permits an appeal of "the adverse determination of any specified pretrial motion". Fed. R. Crim. P. 11(a)(2) is not applicable to this case. Finally, the *Green* Court acknowledged that Rule 4(b) applies only where "the filing occurs after the announcement of a decision with the substantive requisites of finality." *Id.* at 623. As discussed above, the oral announcement in this case was not a final decision.

[11] A panel of the Fifth Circuit has held that Rule 4(a)(2) validates a premature appeal taken from an interlocutory decision. *Alcom Electronic Exchange, Inc. v. Burgess*, 849 F.2d 964, 969 (5th Cir. 1988). The *Alcom* panel acknowledged that its decision conflicted with prior Fifth Circuit precedent, *see United States v. Taylor*, 632 F.2d 530 (5th Cir. 1980), but concluded that it was required to follow a previous panel decision which preceded the *Taylor* case. *Alcom*, 849 F.2d at 967-968. Even so, the *Alcom* court stated that the *Taylor* rule, and not the rule adopted by

(Continued on following page)

PROPOSITION III

BANKERS TRUST CO. V. MALLIS IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION.

The Federal Rules of Civil Procedure specifically provide that no judgment is effective until it is set forth on a separate document and entered on the civil docket. Fed. R. Civ. P. 58. The Advisory Committee that drafted the separate-document requirement noted that prior to its adoption there was confusion over whether words contained in a written opinion or memorandum, like " 'the plaintiff's motion [for summary judgment] is granted,' " constitutes a final decision. The Advisory Committee reasoned that the separate-document requirement "eliminates these uncertainties by requiring that there be a judgment set out on a separate document – distinct from any opinion or memorandum – which provides the basis for the entry of judgment." *See* Notes of Advisory Committee on Rules, following 28 U.S.C.A. Fed. R. Civ. P. 58, at page 642. According to the Supreme Court: "The

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the *Alcom* panel, was the better reasoned approach. *Id.* at 967-969. In *Robinson v. Tanner*, 798 F.2d 1378, 1382-1385 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 319 (1987), the Eleventh Circuit reconciled the conflicting Fifth Circuit precedent and concluded that no real conflict existed. The Eleventh Circuit recognized the distinction between situations where the appeal is taken from an order that is final as to some but not all claims or parties and the situation where an appeal is taken from an interlocutory order which is not final as to any claim or party. *Id.* The Eleventh Circuit held that in the latter situation, the premature appeal must be dismissed as premature. *Id.* at 1385.

sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U.S.C. §2107 begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978) (footnote omitted).

The *Bankers Trust* Court did hold that in an appropriate case the separate-document rule could be waived; however, the *Bankers Trust* case was limited to the situation where judgment has been entered on the clerk's docket but the separate document required by Rule 50 "has *accidentally* not been entered." *Bankers Trust*, 435 U.S. at 388, 98 S.Ct. at 1127 (emphasis added). FirsTier relies on *Bankers Trust* to argue that the parties "waived" the separate-document requirement in this case. FirsTier's argument misses the mark. The waiver rule announced by the *Bankers Trust* Court is not at issue in this case. The January 26, 1989 oral announcement was not set forth on a separate document because it was *not* a *final* decision. *Jones v. Celotex Corp.*, 857 F.2d-273, 275 (5th Cir. 1988) (the separate document requirement cannot be waived when there is not a final decision). Further, even if the oral announcement had been intended as a final decision, the waiver rule would not apply because the oral announcement was *not* entered on the judgment docket. In any event, the waiver rule is not applicable because neither the parties nor the trial court treated the oral announcement as a final decision or intended to waive the separate document requirement.

In the *Bankers Trust* case, the final judgment of the trial court was not set forth on a separate document. Instead, the appeal was taken from a combined opinion and order of the trial court which expressly concluded:

" 'Complaint dismissed in its entirety. So ORDERED.' ". An entry was made on the clerk's docket on the same day containing those same words. *Id.* at 382, n. 1, 98 S.Ct. at 1119. The *Bankers Trust* Court reasoned that under such circumstances the Court of Appeals could properly assert appellate jurisdiction, even in the absence of a separate document. The Supreme Court's analysis is instructive:

> "[T]he District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case. A judgment of dismissal was recorded in the clerk's docket. And petitioner did not object to the taking of the appeal in the absence of a separate judgment."

Bankers Trust, 435 U.S. at 387-388, 98 S.Ct. at 1127.

None of these circumstances are present in the instant case. First, the trial court did not indicate that its oral announcement would represent the final decision in the case. On the contrary, the trial court ordered IMI to prepare suggested findings of fact and conclusions of law, expressly granted FirsTier the opportunity to submit objections to IMI's suggested findings and conclusions, and advised the parties that "[t]he Court will then modify, add to it, delete and write its own findings of fact and conclusions of law *and judgment* on each of these eight policies that we have talked about." J.A. 27 (emphasis added).

Second, the parties did not waive the separate document requirement. Pursuant to the Court's request, both parties subsequently submitted suggested findings of fact

and conclusions of law and awaited the trial court's own findings of fact and conclusions of law *and judgment*. Third, the trial court's oral announcement was not entered in the clerk's docket because it was not intended as a judgment – as noted, the trial court expressly said at the January 26, 1989 hearing that it would write its own findings of fact and conclusions of law *and judgment*.

Unlike the situation in *Bankers Trust*, the fact that a judgment was not set forth on a separate document on January 26, 1989 was not an "error" or an "accident". The trial court did not intend that its oral announcement would be its final decision and the parties did not "waive" the separate document requirement. Under such circumstances, the January 26, 1989 oral announcement cannot be considered a final decision and the *Bankers Trust* case is inapplicable.

CONCLUSION

The Court of Appeals' decision dismissing this appeal for want of jurisdiction should be affirmed.

Respectfully submitted,

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